Supreme Court, U.S.
FILED
AUG 3 1983
ALEXANDER L. STEVAS,

No. 83-115

# In the Supreme Court of the United States

October Term, 1983

BONNIE J. BRIECE,
*Petitioner,*

vs.

WILLIAM E. BRIECE and
GLADYS G. BRIECE,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether under Illinois law a TRO abated upon the abatement of an Illinois divorce suit, which suit itself concededly abated under Illinois law before a scheduled evidentiary hearing could be held on the issues raised by the TRO.

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## STATEMENT OF THE CASE

Petitioner's Statement of the Case is inaccurate and incomplete in the following material respects:

1. No court, state or federal, ever determined that petitioner was physically disabled and financially dependent on the insured. Petitioner's assertion (Petition, p. 4) that such "relevant facts" are undisputed is incorrect.

2. The subject interlocutory order was a TRO only. It was entered by the Illinois divorce court before relevant evidence could be heard, the equities weighed, appropriate

findings made, and the issues raised by said TRO decided pursuant to petitioner's application for a preliminary injunction.

3. The hearing on the application for a preliminary injunction never took place because the insured died several days prior to the scheduled hearing date, whereupon petitioner concedes the Illinois divorce suit abated.

4. At no time before his death did the insured learn that the TRO had been entered, a fact found by the district court which petitioner has never denied.

5. The subject beneficiary change was effected by the insured and the insurance company pursuant to the insurance contract. The change was effected prior to the entry of the TRO and at a time when there were no outstanding court orders prohibiting the change.

## REASONS FOR DENYING THE WRIT

Supreme Court Rule 17 makes it plain that certiorari will be granted only in cases involving issues of genuine public importance, not in situations of private concern just to the parties. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

Petitioner's own formulation of the "Questions Presented" confirms that no such special and important reasons for granting certiorari exist here. No federal question is involved and no Constitutional issue is presented. Moreover, since this is a diversity case involving Illinois law only, the decision below, which is based on Illinois law, is *not* in conflict with a decision of any other federal circuit.

It is an elementary rule of law that, in an action which has concededly abated upon the death of a party, all prior interlocutory orders also abate which were entered before relevant evidence can be heard, the equities weighed, and the issues adjudicated in a final decree. 24 Am.Jur.2d, Divorce and Separation, §183.

This is *exactly* what happened here. The court of appeals below so concluded and its decision, affirming the district court, is clearly in accordance with the applicable law of Illinois. *Dietz v. Speybroeck*, 225 Ill.App. 133 (1922); *Howard v. Howard*, 49 Ill.App.3d 441, 364 N.E.2d 464 (1977); *Bushnell v. Cooper*, 289 Ill. 260, 124 N.E. 521 (1919); *In re Estate of Chandler*, 90 Ill.App.3d 674, 413 N.E.2d 486 (1980).

Petitioner's assertion that the decision below is in conflict with a decision of the Sixth Circuit is untrue. *Candler v. Donaldson*, 272 F.2d 374 (6th Cir. 1959) involved an application of the law of Michigan, not Illinois.

The issue of abatement present here was neither raised by the parties nor considered by the Sixth Circuit. Moreover, in *Candler* there was a finding that the insured had willfully violated a preliminary injunction (not a TRO) which had been entered after a hearing and prior to the beneficiary change. A TRO entered after a lawful change had been effected, and before a scheduled evidentiary hearing could be held, was not involved.

Petitioner's reliance on *Travelers Insurance Co. v. Daniels,* 667 F.2d 572 (7th Cir. 1981), is specious. Unlike the instant case, *Travelers* involved the enforcement of a final judgment, not a purely interlocutory order which, as here, the insured was unaware of and never had an opportunity to resist before death intervened to abate the action.

Petitioner's false assertion that the instant decision will hamper an Illinois divorce court's ability to implement its interlocutory orders ignores all of the controlling Illinois cases cited and discussed by each of the courts below.

Had the Eighth Circuit reached an opposite conclusion, a grave injustice would have been inflicted upon both respondents and the deceased insured who, undeniably, had the express contractual right to effect the subject change. The court of appeals recognized this when it granted respondents' petition for rehearing, withdrew its initial decision, and finally affirmed the district court's judgment in favor of respondents.

Petitioner's assertion that the decision below "may have broader ramifications for equity jurisdiction in general" (Petition, p. 26) is manifestly untrue. Respondents can only assume that such a statement is motivated by an overzealous effort to "package" this routine diver-

sity case, which is clearly of interest only to the parties involved, in such a way as to make it superficially appear to satisfy the stringent requirements of Supreme Court Rule 17.

Although petitioner insists that she should have won below, not respondents, her disappointment scarcely provides an objective basis for certiorari. Moreover, it does not change the fact that justice ultimately prevailed.

## CONCLUSION

Petitioner has failed to offer a single compelling reason why a writ of certiorari should be granted. Accordingly, the instant petition should be denied.*

Respectfully submitted,

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*Counsel for petitioner are able lawyers who are well aware of the expense involved in filing a proper response to a petition for certiorari. They are also cognizant of the time it takes for this Court to consider such a petition. Since the instant petition is blatantly frivolous, an award of damages (sufficient to cover respondents' printing and legal expense) should be considered pursuant to Supreme Court Rule 49.2 in order to discourage exploitation and abuse of Rule 17 in other routine diversity cases.

## CERTIFICATE OF SERVICE

I, Charles A. Blackmar, Counsel of Record for Respondents, hereby certify that I have this day caused three (3) copies of this Brief in Opposition to Petition for Writ of Certiorari to be served on Counsel of Record for Petitioner by depositing the same in a United States post office, with first-class postage prepaid, addressed to Allan Horwich at Schiff Hardin & Waite, 7200 Sears Tower, Chicago, Illinois 60606. All parties required to be served have been served, said service having been effected in the manner hereinabove stated.

Dated this 1st day of August, 1983.

CHARLES A. BLACKMAR
*Counsel of Record for Respondents*